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10                   **UNITED STATES DISTRICT COURT**  
11                   **SOUTHERN DISTRICT OF CALIFORNIA**

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13 DARRYL LOWRY,

14                   Plaintiff,

15                   Case No. 09cv882 BTM (WVG)

16                   v.

17                   METROPOLITAN TRANSIT BOARD  
18                   MTBS, et al.,

19                   Defendant.

20                   **ORDER GRANTING IN PART AND**  
21                   **DENYING IN PART MOTIONS TO**  
22                   **DISMISS**

23  
24                   Defendants Metropolitan Transit System (“MTS”) (erroneously sued as Metropolitan  
25                   Transit Board MTBS) and Torrence Joseph have moved to dismiss the First Amended  
26                   Complaint (“FAC”) [Doc. 43].<sup>1</sup> Defendants Heritage Security Services (“Heritage”) also  
27                   moves separately for dismissal of the FAC. Plaintiff has not opposed the motions. For the  
28                   following reasons, the Court **GRANTS** in part and **DENIES** in part the Motions to Dismiss.

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30                   I. BACKGROUND

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32                   Plaintiff’s Complaint appears to arise out of an incident that occurred on September  
33                   15, 2007. That day, Plaintiff allegedly exited the “929” bus at “12thand Imperial” and planned

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36                   <sup>1</sup> Joseph has already filed an answer. Thus, the Court construes Joseph’s motion as  
37                   a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c).

1 to board the San Diego trolley going toward Old Town. Plaintiff makes several factual  
 2 allegations concerning what happened next. He claims that (1) trolley security officers Jerrod  
 3 Gressett and Torrence Joseph assaulted Plaintiff and tried to break his wrists by handcuffing  
 4 him, resulting in swelling to his wrists and hands; (2) Gressett and Joseph punched Plaintiff,  
 5 grabbed his shirt, and threatened to beat him up; (3) Gressett forged Plaintiff's name on a  
 6 Notice to Appear issued to Plaintiff; (4) Joseph and Gressett falsely accused Plaintiff of  
 7 fighting with other people at the station; and (5) trolley security officers falsely imprisoned  
 8 Plaintiff for eight hours.

9 Plaintiff filed his original Complaint in April, 2009. Defendants MTS and Joseph  
 10 moved to dismiss it, and the Court dismissed the Complaint against MTS entirely, but not  
 11 against Joseph. Defendant Heritage did not move to dismiss the original complaint because  
 12 it failed to receive notice of it.

13 Plaintiff has now filed a First Amended Complaint, alleging eight causes of action  
 14 against all Defendants: (1) violation of his civil and constitutional rights; (2) false swearing;  
 15 (3) assault and battery; (4) forgery; (5) identity theft; (6) defamation; (7) false imprisonment;  
 16 and (8) false arrest.

## 17 18                   **II. LEGAL STANDARD**

19 Under Federal Rule of Civil Procedure 8(a)(2), the plaintiff is required only to set forth  
 20 a "short and plain statement of the claim showing that the pleader is entitled to relief," and  
 21 "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."  
 22 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When reviewing a motion to  
 23 dismiss, the allegations of material fact in plaintiff's complaint are taken as true and  
 24 construed in the light most favorable to the plaintiff. See *Parks Sch. of Bus., Inc. v.*  
 25 *Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). But only factual allegations must be  
 26 accepted as true—not legal conclusions. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).  
 27 "Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
 28 statements, do not suffice." *Id.* Although detailed factual allegations are not required, the

1 factual allegations "must be enough to raise a right to relief above the speculative level."  
 2 *Twombly*, 550 U.S. at 555. Furthermore, "only a complaint that states a plausible claim for  
 3 relief survives a motion to dismiss." *Iqbal*, 129 S. Ct. at 1949.

4 Additionally, courts construe *pro se* pleadings liberally on a defendant's motion to  
 5 dismiss for failure to state a claim. *Thompson v. Davis*, 295 F.3d 890, 895, (9th Cir. 2002).  
 6 The liberal construction rule "is particularly important in civil rights cases." *Ferdik v. Bonzelet*,  
 7 963 F.2d 1258, 1261 (9th Cir. 1992). But this rule "applies only to [a] plaintiff's factual  
 8 allegations." *Neitzke v. Williams*, 490 U.S. 319, 330 n. 9 (1989). "[A] liberal interpretation  
 9 of a civil rights complaint may not supply essential elements of the claim that were not initially  
 10 pled." *Brunsv. National Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997) (quoting  
 11 *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982)).

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### 13 III. DISCUSSION

14

#### 15 A. Plaintiff's Constitutional Claims

16 Defendants argue that the Court should dismiss the Complaint on several different  
 17 grounds. First, Defendants argue that Plaintiff has failed to adequately state a claim for  
 18 violation of his constitutional rights. Plaintiff's Complaint mentions 42 U.S.C. § 1983. Section  
 19 1983 provides that:

20 [e]very person who, under color of any statute, ordinance, regulation,  
 21 custom, or usage, of any State or Territory or the District of Columbia,  
 22 subjects or causes to be subjected, any citizen of the United States or other  
 23 person within the jurisdiction thereof to the deprivation of any rights,  
 24 privileges, or immunities secured by the Constitution and laws, shall be  
 25 liable to the party injured in an action at law, suit in equity, or other proper  
 26 proceeding for redress.

27 To state a claim under section 1983, a plaintiff must plead "(1) a violation of rights  
 28 protected by the Constitution or created by federal statute, (2) proximately caused (3) by  
 29 conduct of a 'person' (4) acting under color of state law." *Crumpton v. Gates*, 947 F.2d 1418,  
 30 1420 (9th Cir. 1991). Local government units can be "persons" under § 1983. *Monell v. New  
 31 York City Dep't of Social Servs.*, 939 F.2d 881, 882 (9th Cir. 1991).

1           Construing Plaintiff's factual allegations liberally, it appears that he claims a  
 2 deprivation of his Fourth Amendment rights under the United States Constitution when he  
 3 was allegedly assaulted.

4           Plaintiff sues a local government entity (MTS), a private corporation (Heritage), and  
 5 individuals (Joseph and Gresset). As MTS points out, however, a local government entity  
 6 will only face liability under section 1983 if the alleged constitutional deprivation was the  
 7 product of a policy or custom of the local government unit. See *Bd. of County Comm'r's v.  
 8 Brown*, 520 U.S. 397, 403 (1997). Similarly, a private corporation is only liable under § 1983  
 9 if the alleged deprivation resulted from a policy or custom. See *id.*; *Rodriguez v. Plymouth  
 10 Ambulance Srv.,* 577 F.3d 816, 822 (7th Cir. 2009) (quoting *Johnson v. Dossey*, 515 F.3d  
 11 778 (7th Cir. 2008)). A plaintiff can also establish section 1983 liability of a local government  
 12 entity or private corporation for "failure to train" its municipal employees. See *City of Canton,  
 13 Ohio v. Harris*, 489 U.S. 378, 388 (1989).

14           Plaintiff makes the following allegations regarding MTS and Heritage's policies and  
 15 procedures:

16           How is there policies toward people coming from the games react to them and  
 17 what is there policies toward these people they say nothing about it in there  
 18 policies and procedures in which I have a copy of they only if you smell of  
 19 alcohol they could have after shave on or rinsed out there mouth with Listerine  
 20 and that has alcohol in it. . . . In which Metropolitan Transit Corporation who  
 21 are liable in the hiring and training of security officers in which it had failed to  
 22 do should go over there policies and work more in to not violating the people  
 23 rights should be briefed in any changes in law which they fail to do. . . . There  
 24 policies don't state anything about the manner of a person, and failed to prove  
 25 anything as far as drunk in public and failing to so that anything they did not  
 use a breathalyzer to determine if I had alcohol in the system to determine all  
 of the trolley security officer should carry an Intoxilyer 5000 and a BAC  
 Datamaster to determine who is drunk or not and none of them do. The  
 customs of Metropolitan Transit should be reviewed because and from what  
 I have read in there policies they have nothing . . . about what there security  
 people do there nothing states anything as far as discipline or firing of these  
 officers. . . . Defendants Joseph and Gressett were hired by Metropolitan  
 Transit Systems, Heritage Security Systems with negligence to training  
 methods in constitutional right and civil right law.

26           Plaintiff's allegations are largely unintelligible. Although he alleges that MTS's policies  
 27 and training are deficient, the allegations are vague and implausible. See *Iqbal*, 129 S. Ct.  
 28 at 1949 (allegations must include facts and be plausible to survive motion to dismiss). He

1 does not draw a connection between his constitutional injuries and a policy or custom, which  
 2 he must do to state a claim under § 1983. See *Brown*, 520 U.S. at 403. Similarly, he fails  
 3 to draw a connection between his injuries and MTS's or Heritage's failure to train their  
 4 employees. Therefore, Plaintiff's § 1983 claims against MTS and Heritage are  
 5 **DISMISSED without prejudice.**

6 Plaintiff has also alleged constitutional claims against two individual Defendants:  
 7 Gresset and Joseph. Gresset and Joseph do not argue that the claims against them should  
 8 be dismissed, and therefore the Court declines to do so.

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#### 10 **B. Plaintiff's State Law Claims Against MTS**

11 Plaintiff has stated a federal constitutional claim against the two individual defendants,  
 12 and the Court has supplemental jurisdiction over his related state law claims. See 28 U.S.C.  
 13 § 1337(a). The Court first addresses Plaintiff's state law claims against MTS.

14 MTS argues that Plaintiff's state law claims should be dismissed for failure to allege  
 15 compliance with the California Government Claims Act ("CGCA"). Pursuant to the CGCA,  
 16 a Plaintiff must first present a written claim to a public entity and wait for the board to act  
 17 upon it before bringing a claim for money or damages against that public entity. Cal. Gov.  
 18 Code § 945.4. A plaintiff's failure to plead compliance with this requirement of the CGCA is  
 19 cause for dismissal. See Karim-Panahi, 839 F.2d 621,627 (9th Cir. 1988).

20 Here, Plaintiff has not alleged compliance with the CGCA. Therefore, all of Plaintiff's  
 21 state law claims against MTS are **DISMISSED without prejudice.**

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#### 23 **C. Plaintiff's State Law Claims Against Heritage and the Individual Defendants**

24 Plaintiff alleges several state-law claims against Gresset and Joseph, as well as

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1 Heritage, their alleged employer. Heritage may be liable for the actions of its alleged  
 2 employees through the doctrine of respondeat superior. *Baptist v. Robinson*, 143 Cal. App.  
 3 4th 151, 160 (2006) (employer vicariously liable for torts of employee under doctrine of  
 4 respondeat superior).

5 Defendants move to dismiss each of Plaintiff's seven state-law causes of action for  
 6 failure to state a claim. The Court addresses each one below.

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8 1. False Swearing

9 The Court construes this as a claim for perjury. But under California law, there is no  
 10 civil cause of action for perjury; it is a criminal offense. Temple Cnty. Hosp. v. Superior  
 11 Court, 20 Cal. 4th 464, 472 (1999). Accordingly, Plaintiff's perjury claims against all  
 12 Defendants are **DISMISSED with prejudice**, as it is clear that further amendment would be  
 13 futile. Franklin v. Murphy, 245 F.2d 1221, 1228 n.9 (9th Cir. 1984) (permitting dismissal with  
 14 prejudice where deficiencies would not be cured by amendment).

15

16 2. Assault and Battery

17 To establish a claim for assault, a plaintiff must allege that he was placed into  
 18 imminent apprehension of a harmful or offensive contact. See *Lowry v. Standard Oil Co. of*  
*Cal.*, 63 Cal. App. 2d 1, 7 (1944). To establish a claim for battery, a plaintiff must allege (1)  
 19 defendant intentionally did an act which resulted in a harmful or offensive contact with  
 20 plaintiff; (2) without plaintiff's consent; and (3) the harmful or offensive contact caused injury  
 21 to the plaintiff. *Fluharty v. Fluharty*, 59 Cal. App. 4th 484, 497 (1997).

22 Plaintiff alleges that Gresset and Joseph repeatedly punched him, grabbed his shirt,  
 23 threatened him, and handcuffed him tightly, causing injury. Construing this allegation  
 24 liberally, Plaintiff has stated claims for assault and battery against Gresset, Joseph, and  
 25 Heritage as their alleged employer. Accordingly, the Court **DENIES** Heritage's Motion to  
 26 Dismiss the assault and battery claims.

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1   3.    Forgery

2           There is no civil cause of action based on forgery alone. Accordingly, the Court  
 3 **DISMISSES with prejudice** Plaintiff's forgery claim.

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5   4.    Identity Theft

6           Although there is no cause of action called identity theft, such a claim may be  
 7 construed as a claim for conversion of intangible personal property. See *CTC Real Estate*  
 8 *Servs. v. Lepe*, 140 Cal. App. 4th 856, 860–61 (2006) (“One’s personal identifying  
 9 information can be the object of theft.”) (quotation marks and citations omitted). The  
 10 elements of a claim for conversion of intangible property are “(1) the plaintiff’s ownership or  
 11 right to possession of personal property; (2) the defendant’s disposition of the property in a  
 12 manner that is inconsistent with the plaintiff’s property rights; and (3) resulting damages.”  
 13 *Fremont Indem. Co. v. Fremont General Corp.*, 148 Cal. App. 4th 97, 119 (2007).

14          Here, Plaintiff appears to allege that one of the Defendants (Plaintiff does not allege  
 15 who) forged his signature on the misdemeanor notice to appear. According to the notice to  
 16 appear, which Plaintiff attached to his original Complaint, the signature only indicates a  
 17 promise to appear and is not an admission of guilt. Although Plaintiff arguably alleges the  
 18 first two elements of identity theft, Plaintiff fails to allege how the purported identity theft  
 19 injured him. The signature on the notice to appear is not an admission of guilt and is only  
 20 a promise to appear before the San Diego Misdemeanor Arraignment Court at a stated time.  
 21 Even assuming one of the Defendants forged his signature, Plaintiff has failed to tie the  
 22 forgery to an injury he suffered.<sup>2</sup> Accordingly, the Court **DISMISSES without prejudice** the  
 23 claim for identity theft.

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27          <sup>2</sup> In his Complaint, Plaintiff cites to *People v. Cooper*, 83 Cal. App. 3d 121, 129  
 28 (1978), which states that “[i]t is not necessary, . . . that a party whose name has been forged  
 has suffered actual damage.” But this case refers to the crime of forgery, not a civil claim for  
 identity theft. A civil claim requires alleging damages. See *Fremont Indem. Co.*, 148 Cal.  
 App. 4th at 119.

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23 5. Defamation

4 To state a claim for defamation, a plaintiff must plead the “intentional publication of  
 5 a statement of fact which is false, unprivileged, and has a natural tendency to injure or which  
 6 causes special damage.” *Ringler Assocs. Inc. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165,  
 7 1179 (2000). The publication may be written or oral, and communication to a single person  
 8 is sufficient. *Id.*

9 Here, Plaintiff alleges the “statements that where [sic] made by Joseph and Gressett  
 10 are not true that I was fighting with other people and fighting with them.” These minimal  
 11 allegations fail to state a claim for defamation. Plaintiff has failed to plead publication  
 12 because it is unclear when Defendants made those statements and to whom they made  
 13 them.<sup>3</sup> His general allegations are too vague to state a claim and the Court therefore  
 14 **DISMISSES without prejudice** Plaintiff’s defamation claim. See *Iqbal*, 129 S. Ct. at 1949  
 15 (threadbare allegations insufficient to state a claim).

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17 6. False Imprisonment

18 To establish a civil claim for false imprisonment, a plaintiff must allege “(1) the  
 19 nonconsensual, intentional confinement of a person, (2) without lawful privilege, and (3) for  
 20 an appreciable period of time, however brief.” *Easton v. Sutter Coast Hospital*, 80 Cal. App.  
 21 4th 485, 496 (2000).

22 Plaintiff has stated a claim for false imprisonment. Plaintiff claims that he was “falsely  
 23 [i]mprisoned for over 8 hours when Metropolitan Transit System Trolley Security accused me

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 25       <sup>3</sup> Although no Defendant has raised this defense, the Court also notes that the  
 26 common-interest exception to defamation likely applies here. If Gressett and Joseph  
 27 discussed Plaintiff’s alleged fighting with each other or other security officers, the  
 28 communication would likely be privileged under the common interest exception to  
 defamation. See Cal. Civ. Code § 47(c) (A statement is privileged if made “[i]n a  
 communication, without malice, to a person interested therein, (1) by one who is also  
 interested, or (2) by one who stands in such a relation to the person interested as to afford  
 a reasonable ground for supposing the motive for the communication to be innocent, or (3)  
 who is requested by the person interested to give the information.”)

1 of being drunk in public in which I was not." Construed liberally, Plaintiff alleges all the  
 2 elements of false imprisonment: he was confined against his will, without cause, for an  
 3 appreciable period of time.

4       Heritage argues Plaintiff has not made specific allegations against it and it should  
 5 therefore be dismissed. But Plaintiff mentions Gresset and Joseph in his false imprisonment  
 6 cause of action, and they are allegedly Heritage's employees. Accordingly, Heritage may  
 7 be liable under the doctrine of respondeat superior and the Court **DENIES** Heritage's Motion  
 8 to Dismiss the false imprisonment claim.

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10 7. False Arrest

11       Plaintiff alleges a claim for false arrest. But false arrest and false imprisonment are  
 12 not separate torts. Rather, false arrest is simply one form of false imprisonment. *Cummings*  
 13 *v. Farmers Ins. Exch.*, 202 Cal. App. 3d 1407, 1422 (1988). Accordingly, the Court will treat  
 14 these allegations as one cause of action.

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16 8. De Facto Government Civil Conspiracy to Violate Rights

17       The Court is unclear what cause of action Plaintiff attempts to allege in this claim.  
 18 The claim is nonsensical and virtually impossible to understand. Given that Plaintiff has  
 19 already alleged a violation of his constitutional rights, and that this cause of action fails to  
 20 state a cause of action, the Court **DISMISSES without prejudice** Plaintiff's claim for a  
 21 government civil conspiracy to violate rights.

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23                          **IV. CONCLUSION**

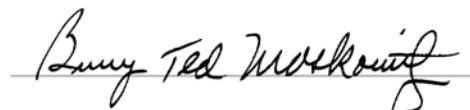
24       For the foregoing reasons, the Court **DISMISSES without prejudice** this suit against  
 25 MTS in its entirety. The Court also **DISMISSES without prejudice** the constitutional claims  
 26 against Heritage, but the constitutional claims against the individual defendants survive.  
 27 Furthermore, the Court **DISMISSES with prejudice** as to all Defendants, the false swearing  
 28 claim, and **DISMISSES without prejudice** the forgery, identity theft, defamation and  
 government civil conspiracy claims. Thus, Plaintiff's surviving state-law claims are the claims

1 against Heritage and the individual defendants for assault and battery, false imprisonment  
2 and false arrest.

3 If Plaintiff wishes to file a Second Amended Complaint correcting the deficiencies  
4 above, he must do so within fourteen days of the issuance of this order. This is the last  
5 amendment the Court will permit.

6 **IT IS SO ORDERED.**

7 DATED: April 16, 2010



8  
9 Honorable Barry Ted Moskowitz  
United States District Judge  
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